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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, United Mine Workers of America; and LOCAL UNIONS NOS. 6572, 7626 and 2236, United Mine Workers of America,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER, CARBON FUEL COMPANY

DAVID D. JOHNSON
FORREST H. ROLES
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia

LARRY L. ROLLER
1300 One Valley Square
Charleston, West Virginia

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

Page

TABLE OF CASES AND STATUTES iii

I. OPINION BELOW 1

II. JURISDICTION 2

III. QUESTION PRESENTED

When, if ever, may a union be held liable for unauthorized strikes in violation of a collective bargaining agreement because of the union's failure to take reasonable steps to end or prevent the strikes? 2

IV. STATUTE INVOLVED 2

V. STATEMENT OF THE CASE 2

(1) Proceedings in the Courts Below.

(a) In the District Court 2

(b) In the Court of Appeals 4

(2) Summary of Evidence Before The District Court 5

(a) The Parties 5

(b) Collective Bargaining Between the Parties 6

(c) Wildcat Strikes 13

VI. SUMMARY OF ARGUMENT 18

VII. ARGUMENT

A. A UNION BOUND BY A COLLECTIVE BARGAINING AGREEMENT CONTAIN-

Page

ING AN EXPRESS OR IMPLIED NO-STRIKE CLAUSE HAS THE OBLIGATION, WITHOUT MORE, TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES BY ITS MEMBERS AND SUBORDINATE BRANCHES IN VIOLATION OF THAT CLAUSE 20

(1) The Legal Standard for Interpretation of Collective Bargaining Agreements 20

(2) The Policy Of Our National Labor Laws Is That Collective Bargaining Agreements, And Particularly The Obligation To Settle Disputes Peacefully Through Grievance and Arbitration Procedures Therein, Shall Be Effectively Enforceable In Federal Courts 21

(3) Effective Implementation Of This Policy Of Our National Labor Laws Requires That Unions Use All Reasonable Means To Prevent And Terminate Wildcat Strikes By Their Members and Subordinate Branches 24

(4) Under Accepted Principles Of Traditional Contract Law, A Union Bound By A Bargaining Agreement Containing A No-strike Clause Has A Duty To Use All Reasonable Means To Prevent And Terminate Strikes In Violation

Page

Of That Agreement By Their Members And Subordinate Branches 26

B. ASSUMING, ARGUENDO, THAT THERE WAS NO IMPLIED COMMITMENT ON THE PART OF THE DISTRICT AND INTERNATIONAL TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACTS, SUCH AN OBLIGATION IS PROPERLY IMPLIED FROM THE TERMS OF THE CONTRACTS THEMSELVES 28

VIII. CONCLUSION 35

IX. APPENDIX TO BRIEF 1A

TABLE OF CASES AND STATUTES

Bituminous Coal Operators Association v. *United Mine Workers of America*
585 F.2d 586 (3d Cir. 1978) 28

Boys' Markets v. *Retail Clerks Union*
398 U.S. 235 (1970) 23

Buffalo Forge Co. v. *Steelworkers*
428 U.S. 397 (1976) 24

Eazor Express Inc. v. *Teamsters*
520 F.2d 951 (3d Cir. 1975) 27, 28

Gateway Coal Co. v. *UMWA*
414 U.S. 368 (1974) 8, 24, 29, 35

International Union, UMWA v. *NLRB*
257 F.2d 211 (D.C. Cir. 1958) 29, 30, 34

Page

International Union, UMWA (Boone County Coal Corp.) 117 NLRB 1095 (1957) 30, 31, 32, 33

International U., UMWA (Southern Coal Producers Association) (Unpublished) 31, 32

Panello v. *International U., UMWA*, 89 F.Supp. 935 (D.C. 1950) 31

Republic Steel Corp. v. *United Mine Workers of America* 570 F.2d 467 (3d Cir. 1978) 28

Steelworkers v. *American Mfg. Co.* 363 U.S. 564 (1960) 23

Steelworkers v. *Enterprise Corp.* 363 U.S. 593 (1960) 23

Steelworkers v. *Warrior and Gulf Mfg. Co.* 363 U.S. 574 (1960) 23

Teamsters v. *Lucas Flour Co.* 369 U.S. 95 (1962) 21, 23

Textile Workers Union v. *Lincoln Mills of Alabama* 353 U.S. 448 (1957) 20, 21, 22, 23

United Construction Workers v. *Haislip Baking Company* 223 F.2d 872 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1955) 4

United States Steel Corp. v. *United Mine Workers of America* 534 F.2d 1063 (3d Cir. 1976) 29

AUTHORITY

4 Corbin on Contracts, § 866 (West Publishing Co., 1951) 26, 27

Page

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 101, *et seq.* 24

29 U.S.C. § 185 2

29 U.S.C. § 174(a) 22

29 U.S.C. § 174(d) 22

MISCELLANEOUS

Senate Report No. 105, 80th Cong., 1st Sess. 22, 23, 25

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I. OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix to the Petition for Certiorari ("P.A.") at pp. A1-A10 and is reported at 582 F.2d 1346. The District Court did not render an opinion.

II. JURISDICTION

The opinion of the Court of Appeals was announced on September 21, 1978. Petitioner's timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on October 31, 1978. The mandate was stayed by the Court of Appeals pending disposition of the case in this Court on November 13, 1978. The petition for a writ of certiorari was filed on January 29, 1979, and was granted on March 19, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

When, if ever, may a union be held liable for unauthorized strikes in violation of a collective bargaining agreement because of the union's failure to take reasonable steps to end or prevent the strikes?

IV. STATUTE INVOLVED

This case involves § 301 of the Labor-Management Relations Act (the "Act"), 61 Stat. 156, 29 U.S.C. § 185, printed in P.A. at pp. B1, 2.

V. STATEMENT OF THE CASE

(1) Proceedings in the Courts Below.

(a) In the District Court.

This is an action under § 301 of the Act by Carbon Fuel Company (the "Employer" or "Carbon") against the International Union, United Mine Workers of America ("International"), which is the duly recognized exclusive bargaining agent for the Employer's production and maintenance employees, and its administrative subdivisions, District 17, United Mine Workers of America ("the District"), and Local Unions Nos. 6572, 7626 and

2236, United Mine Workers of America ("the Locals"), all of which defendants are sometimes collectively referred to herein as "Unions". The action seeks damages for a series of forty-eight strikes occurring during the years 1969-1973, inclusive, allegedly in violation of the terms of two collective bargaining agreements between the Unions and the Employer, the National Bituminous Coal Wage Agreement of 1968 and the National Bituminous Coal Wage Agreement of 1971 (contracts). Of those forty-eight strikes, thirty-one were over issues arbitrable between the Employer and the Unions, and the other seventeen, while involving an arbitrable issue of whether the Unions had the right to engage in the strike, had non-arbitrable issues as their underlying causes.

The case was tried before a jury in the United States District Court for the Southern District of West Virginia. At the conclusion of the evidence, the District Court denied the motions of the International and District for a directed verdict based upon their claim that there was insufficient evidence of their liability for the strikes. The Court further directed the jury to find that all of the strikes, no matter what their underlying causes, were violations of the contracts and that the Locals were responsible for the strikes because of the mass actions of their members and officers in engaging in them. The Court submitted the questions of the amounts of damages, and the responsibility of the District and International, to the jury. Its charge relating to International and District liability told the jury that the International and District had a responsibility under the contracts to use all reasonable means available to them to prevent and end strikes in violation of the contracts, and that from such

time as they had an opportunity to use such means and failed to do so, they were liable for the strikes. (A. 197)

The jury returned individual verdicts as to each strike, awarding damages individually against the Locals in a cumulative total amount of $722,347.43, against the District in the total amount of $242,130.80, and against the International in a total amount of $206,547.80. The verdicts were joint and several, rather than cumulative. They reflected the jury's determination under the Court's "all reasonable means" instruction that the District and International were responsible with respect to only some of the strikes, and only a portion of the damages resulting from the strikes.

(b) In the Court of Appeals.

Upon appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgments as to the seventeen strikes whose underlying causes were issues not arbitrable under the contracts, as to all of the Unions; and affirmed the judgments as to the remaining thirty-one strikes, as to the Locals only. As pertinent here, the Court of Appeals reversed all judgments against the District and International Unions upon the basis that under the contracts they had no obligation to use "all reasonable means" to end and prevent unauthorized strikes, but rather that the standards for their liability, as higher union entities, were those established in the case of *United Construction Workers v. Haislip Baking Company*, 223 F.2d 872 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1955). Quoting from that case, the Court of Appeals stated the obligation of a parent union with regard to a strike not called or formally authorized by it to be as follows:

> " 'If [the representatives of UMWA] had done nothing when plaintiff called on them to help get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything that they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did.' " 582 F.2d at 1351. P.A. pp. 9, 10.

Upon that holding, the Fourth Circuit vacated the judgments as to the International and District Unions, and remanded the case to the District Court with directions to dismiss as to the International and District. It is this action by the Fourth Circuit which is before this Court.

(2) Summary of Evidence Before The District Court.

(a) The Parties.

Carbon is a corporation engaged solely in the business of mining, preparing and selling coal. Its operations are in two geographically separate divisions located in central West Virginia. Those divisions are denominated its Winifrede and Carbon Divisions. In each division are a number of mines and related facilities, such as repair shops and coal preparation plants. (A. 19, 21) Carbon has recognized the International Union as the exclusive bargaining agent for its production and maintenance employees at its operations since the 1930's. (A. 20)

The International Union has structured itself through its Constitution into three tiers. At the top is the Inter-

national Union, which is composed of all members. (A. 194) At the second level are the Districts, which are subordinate branches of the International and have jurisdiction over all members of the International within geographic districts determined by the International. On the bottom tier are the various local unions, which likewise have jurisdiction established by the International Union. The District involved here is District 17, and the locals, Local 2236 (with jurisdiction over Carbon's Winifrede Division) and Locals 6572 and 7626 (with jurisdiction over separate mines and related facilities in the Carbon Division).

The power of the International to control the actions of the districts and locals is extensive under its Constitution. The International has "supreme legislative, executive and judicial authority over all members and subordinate branches" (A. 194); Districts and Locals must be chartered by and be subject to the laws of the International Union, which has the power to revoke their charters and to create provisional governments of the Locals and Districts. (A. 194, 95) The International and the Districts have a right to reverse any action taken by a Local considered by them to be opposed to the interests of the United Mine Workers or any Local Union or District involved. (A. 195) Only the International Union has the right to call a strike. (A. 91, 121) During the vast majority of the time here involved, the International had complete control, through trusteeship, of District 17. (A. 58, 59)

(b) Collective Bargaining Between The Parties.

Both the Unions and Carbon relied upon the collective bargaining history. As indicated above, Carbon has

recognized the International as the exclusive bargaining agent for its employees since the 1930's. Since 1941, Carbon has been a party to essentially all national contracts entered into with the International. The method of collective bargaining for new agreements has been the same in all essential particulars.

Carbon is and has been a member of Southern Coal Producers Association, a multi-employer association of coal operators formed for purposes of bargaining collectively with the United Mine Workers of America. Prior to 1948, Southern Coal Producers' Association acted as agent for Carbon and other coal operators located in the southern Appalachians in negotiating for new collective bargaining agreements. (A. 27) After 1948, Carbon has participated in bargaining through Southern's membership in the Bituminous Coal Operators Association, a national multi-employer association of coal operators formed exclusively for purposes of negotiating contracts with the United Mine Workers of America. Id.

Whenever negotiations for a new contract have been necessary, Southern Coal Producers, prior to 1948, or Bituminous Coal Operators Association, since 1948, have met and bargained with the International Union, as the exclusive bargaining agent for all of the production and maintenance employees of the operator members of those associations. (A. 28) The Locals and Districts have played such part in the negotiations as the International has, by its Constitution and otherwise, from time to time directed. Only the International Union, with such participation of subordinate branches as it has established and permitted, has signed the successive national agreements entered into since 1941. (A. 28, 29) Only the two multi-employer associations previously

referred to have executed the agreements, in each instance, on behalf of their operator members.

Each contract since the 1941 agreement has contained a broad mandatory grievance and arbitration procedure. That procedure contemplates settlement through it of differences "as to the meaning and application of the provisions of [the agreement], differences arising about matters not specifically mentioned in the agreement, or any local trouble of any kind." (A. 136-186) The scope, and mandatory nature, of the grievance and arbitration procedure of the various agreements, from the 1941 agreements to those sued upon in this action, have not significantly changed, and are not legally different from those provisions considered by this Court in *Gateway Coal Co.* v. *UMWA*, 414 U.S. 368 (1974).

The grievance provisions of the two contracts sued upon, and the procedure followed by the parties in implementing them, were essentially the same. The procedure under the National Bituminous Coal Wage Agreement of 1968 involved five steps. In the first step the aggrieved employee or employees took up the matter with his or their immediate foreman and attempted at that level to resolve it. If no resolution occurred, the grievance proceeded to the second step, where it was considered by a member of management designated by Carbon, representing the Company, and the grievant and his Mine Committee (a committee elected by the members of the Local Union at the facility involved). If no settlement was reached at that step, the matter was then referred to the third step where the grievant was represented by a District representative, and the Employer by a different management representative. Usually the Employer's representative was an employee of

Kanawha Coal Operators Association, an association of operators in the area in which Carbon operates, which was created for the purpose of handling grievances on behalf of member operators. If no agreement was reached at the third step, the grievance was referred to a joint board, composed of two representatives of the Union and two of the employer. Most often, the Union representatives were District officials, and the employer representatives were employees of Kanawha Coal Operators Association. If no agreement was reached at that stage, the matter was referred to an arbitrator selected by the parties for resolution. Evidence was normally taken and recorded at the third step. The evidence was transcribed and submitted, with the briefs, to the arbitrator. No official of the International Union participated at any level. (A. 47-51)

The procedure was the same under the 1971 Agreement, except that there was a separate, expedited procedure in the handling of discharge cases. That expedited procedure skipped the first, second and fourth steps of the regular grievance procedure, and provided for significantly shortened time periods between the steps. (A. 184, 85)

Although the grievance procedure provisions of the contract were essentially unchanged from the first agreement in 1941, other provisions relating to the obligation of the Unions to resolve matters through the grievance procedure other than by strikes have substantially changed. In the 1941 Southern Wage Agreement, and Appalachian Joint Wage Agreement, there was contained, in addition to the grievance procedure, the following provisions:

"A strike or stoppage of work on the part of

> the Mine Workers shall be a violation of this Agreement." (A. 137, 142)

This provision was carried forward in the National Bituminous Coal Wage Agreement of 1946. (A. 144) However, the National Bituminous Coal Wage Agreement of 1947 made substantial changes.

First, the National Bituminous Coal Wage Agreement of 1947 provided as follows:

> "It is the intent and purpose of the parties hereto that this Agreement will promote and improve the industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement *during such time as such persons are able and willing to work.*" [Emphasis Added] (A. 147)

Moreover, in the provision with regard to the carrying forward of District Agreements, the 1947 Agreement provided:

> "Prior practice and custom not in conflict with this Agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guaranty' clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement." (A. 148)

Finally, the "Miscellaneous" clause of that contract contained the following provisions:

> "1. Any and all provisions of either the Appalachian Joint Wage Agreement of June 19, 1941 or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'Penalty' clause or clauses or any clause denominated 'illegal suspension of work' are hereby rescinded, cancelled, abrogated and made null and void.
>
> * * *
>
> "3. The contracting parties agree that, as a part of the consideration of this contract, any and all disputes, stoppages, suspensions of work and any and all claims, demands or actions drawing therefrom or involved therein shall be by the contracting parties settled and determined exclusively by the machinery provided in the 'Settlement of Local and District Disputes' section of this Agreement; or, if national in character, by the full use of free collective bargaining as heretofore known and practiced in the industry." (A. 150)

These provisions were carried forward into the National Bituminous Coal Wage Agreement of 1948. (A. 151)

Again, substantial modifications were made in the National Bituminous Coal Wage Agreement of 1950. First, the "willing and able" language contained in the 1947 Agreement and carried forward into the 1948 Agreement was removed from the Coal Wage Agreement of 1950. (A. 153) The provisions relating to the repeal of "no strike" or illegal suspension of work clauses in the District and past Wage Agreements were retained. However, in the "Miscellaneous" section, the parties added a fourth section as follows:

> "4. United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this Agreement." (A. 156, 57)

The 1951 Agreement carried forward the provision of the 1950 Agreement above referenced. (A. 157) There was, however, some change made in the National Bituminous Coal Wage Agreement as amended in September, 1952. That Agreement rewrote the "Miscellaneous" clause by striking out subsection 4, quoted above, and combining it with the old subsection 3 (originally appearing in the 1947 Agreement), so that the new combined section read as follows:

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of the Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." (A. 160)

The amendments to the Agreement, made effective in September of 1955, September of 1956, December of 1958, April of 1964, and April of 1966, did not affect the relevant provisions of the contract. Nor was there any change in the new contract of 1968, which is the first of the two contracts sued upon in this action. (A. 173-78)

In the National Bituminous Coal Wage Agreement of 1971, the "Miscellaneous" portion of the contract was removed. The first paragraph of that "Miscellaneous" portion, rescinding no strike clauses in prior agreements and first adopted in the contract in 1947, was reduced to a note appearing at the beginning of the contract.

The third paragraph of the "Miscellaneous" section was carried forward in Article XX, entitled "Maintain Integrity of the Contract". (A. 186, 87) The wording was not changed.

(c) Wildcat Strikes.

The evidence was uncontradicted that before, during and after the period covered by the lawsuit, wildcat strikes were a normal and regular occurrence in the UMWA represented coal industry, not only at the operations of Carbon, but also at the operations of other signatories in the area. Specifically, the evidence showed that during the period of the suit Kanawha Coal Operators Association represented operators of between 75 and 90 separate mines. During the period October, 1968 to October, 1969, there were a total of 71 separate wildcat strikes at those operations, which resulted in the mines of members of the Association being shut down for 819 mine days. For the similar period of October, 1969, through October, 1970, there occurred 60 such strikes with a loss of 371 mine days. For the period October, 1970 to October, 1971, the figures are 216 strikes and 429 mine days lost. For the period of October, 1972 to October, 1973, there were a total of 163 strikes with 563 mine days lost. (A. 32, 33) It is likewise uncontroverted that there occurred at Carbon's operations a total of 48 wildcat strikes during the period of 1969 through 1973. All figures exclude contract strikes engaged in for the purposes of bringing economic pressure upon operators to agree to bargaining demands made in negotiations for new contracts, which strikes were authorized by the International Union. (A. 32)

At the occurrence of each such strike it was the normal and regular practice of Carbon to immediately notify the

Kanawha Coal Operators Association of the existence and cause of that strike. (A. 52) Kanawha Coal then notified District 17 of the United Mine Workers of America of the strike, and District 17 immediately notified the office of the President of the International Union — during this period of time W. A. "Tony" Boyle. (A. 59, 60) Moreover, it was the normal practice of the officers of the local Union involved to notify the District of such strikes as soon as they occurred. By this dual practice, the International Union was notified by ten o'clock in the morning of each day of each strike within the District. (A. 60) Periodically, the telephoned strike reports were reduced to writing and delivered to the office of the President of the International Union. Id.

The International Union had long been aware of the strike problem. Under date of October 24, 1951, the International President, Vice President and Secretary-Treasurer, on behalf of its Executive Board, sent a letter to all members of the United Mine Workers of America reflecting the concern of the International about a "wave of unauthorized local strikes." The International Executive Board in that letter urged all members, Local Union officers and Committeemen, and District and International officers to use their efforts and influence to prevent the occurrence of unauthorized strikes, which were recognized to be in contravention of the Constitution and in opposition to the established policies of the United Mine Workers of America. (A. 190, 91) These directives were not followed. Therefore, on May 17, 1956, the International Union adopted a further declaration of policy, which was likewise communicated to the officers and members of the Union. That declaration of policy recognized that local strikes were prohibited by the earlier

directive, and that some Local Unions had ignored that policy. Upon that basis, the International Executive Board (the governing body of the Unions between conventions) affirmed its declaration of October, 1951, and instructed compliance therewith. The Executive Board further advised that Local Unions failing to abide by that directive would be subject to discipline and penalties to be imposed by the Board; that Local Union officers "giving aid and comfort" to strikes, or who were "guilty of negligence in the failure to prevent them", would be subject to disciplinary action along with individual members guilty of promoting, conducting and prolonging such strikes, and that repetition of such offenses would bring further and more severe penalties. (A. 192, 93)

On September 3, 1966, the previous two directives of the International Executive Board having not accomplished their goal, the Board resolved that: "when it is proven that any member or members were engaging in promoting, conducting or prolonging an unauthorized work stoppage, such members shall be penalized the sum of five dollars for each day of such unauthorized stoppage Such penalty shall be in addition to any penalty imposed by the Local Unions involved." (A. 187-89)

Each of these directives of the International Union was delivered to all the members of the Union. Not one was ever followed through at the operations of Carbon, or at the operations of other members of the Kanawha Coal Operators Association. No discipline of any kind or type was ever taken during the period in question by the International or District against any Local, Local officer, or Local member for engaging in, promoting or conducting a wildcat strike. (A. 61, 62;

78; 82; 87; 92, 93; 100; 107; 115; 131) Indeed, the International itself did absolutely nothing with regard to wildcat strikes during this period. Instead, it relied entirely upon the districts to take any action to be taken. The District's reaction was uniform. It relied entirely upon persuasion to prevent and end the increasingly numerous wildcat strikes.

The actions of the District and Local Unions were uniform for each strike. Whenever a strike occurred, the District representative responsible for that Local immediately contacted the officers of the Local to determine the reason for the strike. He then urged that a meeting of the Local be called. The District representative usually attended those meetings. At the meetings, the District representative routinely directed the members to return to work. (A. 64-66) Frequently he would instruct the men concerning the power and authority of the International and District to take disciplinary action against the Local, and against the members themselves. (A. 104; 115, 16;) Despite those remonstrations, the strikes often went on for days before they ended. In instances in which the members either voted not to work, or simply did not return to work, an additional meeting would be called with additional remonstrations and efforts to persuade the strikers to return to work. In no instance was the power and authority of the International and District Unions to discipline recalcitrant Locals and members, to impose trusteeship upon recalcitrant Unions and replace their recalcitrant local officers, or to "reverse" the actions that Local Unions had taken, employed.

The actions of the District and Local officers is best described in the following testimony of Lester Kincaid,

the President of Local 2236 during much of this period:

"Q Now you said that as soon as you had a work stoppage, you called a local union meeting and at that local union meeting you called it at the bathhouse and at that local union meeting you told them about the seriousness of the work stoppage and you told them that the company would get a temporary restraining order from federal court to get them back to work and told them if they violated the temporary restraining order, they might be held in contempt of court and fined. Is that what you told them?

A Yes sir, I told them that several different times.

Q Did you tell them anything about the seriousness of it, other than the possibility that they might get fined in federal court?

A Oh yes. I told them about that because everytime—

Q I mean anything other than federal court?

A I would tell them that they could be fined through the international union.

Q And did you make specific reference to the constitutional provisions relating to international discipline and district discipline for engaging in an unauthorized work stoppage?

A The biggest part of them knew that already, Mr. Roles.

Q So you didn't need to tell them?

A I figured the biggest part of them knew about it already.

Q Did you tell them about that every meeting you had or practically every meeting?

A It was just like a scratched record, Mr. Roles. I told them each time over and over.

Q You kept telling them again and again?

A Yes, sir.

Q And you kept ordering them back again and again?

A Yes, sir.

Q Now you ordered them back everytime and you warned them about international discipline everytime. How many times has the international disciplined them?

A None as I know of.

Q How many times has the district disciplined them?

A None as I know of.

Q Your orders weren't worth a dime, were they?

A I believe we said that in June 1974. Yes, sir.

Q And that's true, isn't it?

A Yes, sir.

Q And the district's orders weren't worth a dime either were they?

A At that time, I would say no. If they didn't return to work, nothing wasn't worth a dime. It wasn't even worth a penny." (A. 99-101)

Various present and past officials of the unions testified as to their opinions as to the usefulness of the various disciplinary and other affirmative means available to the International and District which could have been taken to try to prevent and terminate the strikes, but which were not attempted. Their testimony was to the effect that in their opinion, no matter what the individual circumstances of a particular strike, such actions would have been counter-productive. (A. 79; 93; 120)

VI. SUMMARY OF ARGUMENT

I. It is the position of Carbon that a no strike clause, whether expressed or implied, places upon the union entering into it, without more, the obligation to use all

reasonable means to prevent and end strikes by its members and subordinate branches in violation of that clause, regardless of whether or not the union brought about or authorized the strikes.

The obligation undertaken by a union not to strike during the term of a collective bargaining agreement is illusory and of no value if that union may do nothing when its members and subordinate branches violate the union's promise. The duty to use all reasonable means to prevent and stop such breaches of labor contracts is essential to the maintenance of collective bargaining. As such, that duty on the part of unions signatory to collective bargaining agreements containing expressed or implied "no strike" clauses is implied under the normal rules of contract law, and is likewise required by the policy of our national labor laws.

II. In addition to, and regardless of, the implied duty to make all reasonable efforts to prevent and end wildcat strikes, which duty arises from the promise not to engage in such strikes, the District and International contractually obligated themselves in the National Bituminous Coal Wage Agreements of 1968 and 1971, by the maintenance of the integrity of the contract clauses contained therein, to use all reasonable means to prevent and terminate strikes over arbitrable issues. No rational meaning can be assigned to those clauses except that the parties thereto obligated themselves to use all reasonable means to see to it that the contracts, including the implied no strike provisions contained in them, are enforced and obeyed. With respect to wildcat strikes, an undertaking to "maintain the contract" can mean no less than a duty to take affirmative action to prevent and stop its breach. The collective bargaining history,

instead of negating such a meaning, as indicated by the Fourth Circuit, (P.A. p A. 7, 8) actually requires such an interpretation when properly considered.

VII. ARGUMENT

A. A UNION BOUND BY A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN EXPRESS OR IMPLIED NO-STRIKE CLAUSE HAS THE OBLIGATION, WITHOUT MORE, TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES BY ITS MEMBERS AND SUBORDINATE BRANCHES IN VIOLATION OF THAT CLAUSE.

(1) The Legal Standard For Interpretation Of Collective Bargaining Agreements.

Since this is a case under §301 of the Act, the proper source of the law upon which this Court must decide the issue presented is the policy of our national labor laws enacted by the Congress. See *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456-57 (1957), in which this Court said:

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." [Citations omitted]

In addition, this Court has relied, with less emphasis, upon "accepted principles of traditional contract law."

Teamsters v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962). The application of both of these principles of construction clearly shows that the District Court's charge was correct, and that the Court of Appeals erred in ruling that a Union may do nothing when its members and subordinate branches breach a no-strike obligation to which the Union has committed itself in contract negotiations.

(2) The Policy Of Our National Labor Laws Is That Collective Bargaining Agreements, And Particularly The Obligation To Settle Disputes Peacefully Through Grievance and Arbitration Procedures Therein, Shall Be Effectively Enforceable In Federal Courts.

In summing up the congressional intent in enacting § 301 of the Act, this Court said in *Textile Workers Union* v. *Lincoln Mills, supra,*:

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." 353 U.S. at 455

In short, the essential purpose of §301 was to promote effective enforcement of collective bargaining agreements in Federal Courts so that the making and maintaining of such agreements will promote industrial peace. That clear congressional intent and purpose is evident in the legislative history of §301. Mr. Justice Frankfurter, in his dissent in *Lincoln Mills, supra,* collected the extensive references in that history to "discussion of the problem of contract responsibility" and "the desirability of having

collective agreements enforceable against the union as well as the employer". *Textile Workers Union* v. *Lincoln Mills,* (Appendix to Dissent) 353 U.S. at 513 and 523.

Other provisions of the Act evidence that same policy. Thus § 704(a) of the Act, 29 U.S.C. § 174(a), provides:

> "(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—
>
> (1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, * * *"

Likewise, § 203(d) of the Act, 29 U.S.C. § 174(d), provides:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

By these provisions, Congress intended to encourage the grievance-arbitration provision found in most collective bargaining agreements today, as the exclusive manner of resolving disputes arising during contract terms. As all of these provisions clearly show, the policy Congress sought to serve in enacting the Act, and particularly § 301 thereof, is that expressed in Senate Report No. 105, 80th Cong., 1st Sess., p. 16, wherein it is stated:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

This Court has constantly, over many years, remained faithful to that legislative purpose, and fashioned law in its decisions which effectuate it. Thus, in *Textile Workers* v. *Lincoln Mills of Alabama, supra,* this Court held agreements to arbitrate in collective bargaining contracts to be specifically enforceable by injunction. In the "Steelworkers Triology", *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers* v. *Warrior and Gulf Mfg. Co.,* 363 U.S. 574 (1960); and *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593 (1960), this Court established the principles that Courts should read arbitration clauses broadly in determining whether to order submission of issues to arbitration and that Courts should refuse to enforce decisions rendered by arbitration only in very limited circumstances. Further, in *Teamsters Local 174* v. *Lucas Flour Co., supra,* this Court, relying upon this same policy of our national labor laws, construed a mandatory grievance and arbitration procedure as giving rise to an implied promise not to strike over issues subject to settlement under that procedure. In *Boys' Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970), the Court accommodated the anti-injunction policy of the Norris-

LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and particularly section four thereof, 29 U.S.C. § 104, with this overriding policy of establishing labor peace by the enforcement of agreements to arbitrate; and, despite the clear language of Norris LaGuardia, permitted Federal Courts to grant strike injunctions where the strike is over an issue which the union has promised to resolve by a mandatory grievance and arbitration procedure. In *Gateway Coal Co.* v. *United Mine Workers of America, supra,* the Court refused to carve out an exception to *Boys' Markets* for disputes over the issue of safety.

This Court has not retreated from its constant adherence to this clear policy of our national labor laws. Nothing in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976), which limited *Boys' Markets* to circumstances where the underlying cause of the strike was arbitrable between the employer seeking the injunction and the union whose strike is sought to be enjoined, casts doubt upon the principles established over the long series of cases discussed above. The basic rationale of *Buffalo Forge* is that a strike which is not in derogation of the duty to arbitrate does not contravene this well established policy, because such a strike has "neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain". *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. at 408. Nor has Congress seen fit to amend the Act in the face of this uninterrupted series of decisions by this Court applying it.

(3) Effective Implementation of This Policy of Our National Labor Laws Requires That Unions Use All Reasonable Means To Prevent and Terminate Wildcat Strikes By Their Members and Subordinate Branches.

The record in this case shows that the well established

policy of our national labor laws has been a failure in the coal industry in general and at the operations of Carbon in particular. Thirty-one strikes over arbitrable issues in a four-year period is not the "industrial peace through faithful performance" envisioned by the Congress in enacting § 301. The failure of that policy is not due to any inherent defect in the policy. As this Court knows, it has generally worked well in American industry. Rather, it is submitted, the failure of that policy as reflected by this case arises from the fact that under the law as enunciated by the Fourth Circuit in this case, there is no real obligation upon the International and District to faithfully perform their agreements. The promises which they solemnly made, to resolve disputes arising under the contract without resort to economic coercion, are illusory on the part of the Unions if the only financially responsible tiers of the Unions, the Districts and International, may sit by with impunity while their judgment-proof Locals flagrantly violate those promises.

The facts in this case show with overwhelming force the necessity of requiring unions to take reasonable steps to prevent and end wildcat strikes by their members in order to fulfill the clear, important policy of our national labor laws. If unions such as the International and District can, in the words of Senate Report 105, *supra,* stand by with "relative impunity" and do nothing while their members and subordinate branches violate the collective bargaining commitments they have made, then such agreements "do not tend to stabilize labor relations." If such agreements are unenforceable because responsibility for breaches attaches only to financially irresponsible Locals, then Carbon and other employers have "no effec-

tive method of assuring freedom from economic warfare for the term of the agreement".

(4) Under Accepted Principles of Traditional Contract Law a Union Bound by a Collective Bargaining Agreement Containing a No-Strike Clause Has a Duty to Use All Reasonable Means to Prevent and Terminate Strikes in Violation of That Agreement by Their Members and Subordinate Branches.

The International bargained for and signed each of the contracts. In each, the International promised to resolve all disputes through the grievance and arbitration procedure, implicitly without strikes over such disputes. Thereafter, the International effectively did nothing. The performance of its obligations to resolve disputes not national in character was assigned to its districts and locals, here the District and the Locals. The Locals repeatedly violated that obligation. The jury found, and it is not subject to question here, that the International and the District (for and on behalf of itself or the International) failed to exercise all reasonable means to end such violations by the Locals and their members. Under accepted principles of traditional contract law, the International and District are liable for these breaches by their Locals and members.

First, it is accepted and undisputed contract law that the mere assignment of an obligation under a contract does not relieve the original obligor of responsibility for its performance. The proposition is well stated in 4 Corbin on Contracts, § 866 (West Publishing Co., 1951), where it is said:

> ". . . No duty can ever be effectively assigned, if we adhere to our description of an assignment as a unilateral expression of the assignor. Applying that definition to duties instead of rights, we have: An assignment is an expression of intention by the assignor that his duty shall immediately pass to the assignee. Many a debtor wishes that by such an expression he could get rid of his debts. Any debtor can express such an intention, but it is not operative to produce such a hoped for result. It does not cause society to relax its compulsion against him and direct it toward the assignee as his substitute. In spite of such an 'assignment,' the debtor's duty remained absolutely unchanged. The performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped."

Thus, the International's assignment of its obligation to the locals and Districts would not, under traditional contract principles, relieve it of that obligation. Only performance by those subordinate branches would do so.

As indicated above, a construction of the contracts here to permit the International to relieve itself of its obligations simply by delegating them to its Locals would effectively render the "no-strike" promise illusory. This fact was recognized in *Eazor Express Inc.* v. *Teamsters*, 520 F.2d 951 (3rd Cir. 1975). There the Court said:

> "A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal

> effect. 1A Corbin on Contracts 8-9; 3 Corbin on Contracts 168-191; 17 Am. Jur. 2d 452." 520 F.2d at 960.

That same principle was applied to the language contained in the contracts here sued upon in *Republic Steel Corp.* v. *United Mine Workers of America*, 570 F.2d 467 (3rd Cir. 1978) and *Bituminous Coal Operators Association* v. *United Mine Workers of America*, 585 F.2d 586 (3rd Cir. 1978).

It is not Carbon's position that traditional contract law principles should be employed to establish a rule that unions are absolutely liable for contract violations by their members and subordinate branches. Some accomodations must be made for the differing structures of unions and the rights of their members and subordinate branches as compared to those of businesses. However, this accomodation does not require the obliteration of the traditional principles of contract law that a party to a contract has an obligation to act affirmatively to see to the performance of the contract and that contracts will be construed so as to provide for real, rather than illusory, promises.

B. ASSUMING, ARGUENDO, THAT THERE WAS NO IMPLIED COMMITMENT ON THE PART OF THE DISTRICT AND INTERNATIONAL TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACTS, SUCH AN OBLIGATION IS PROPERLY IMPLIED FROM THE TERMS OF THE CONTRACTS THEMSELVES.

Both the contracts sued upon contain the specific promise by the Union to "maintain the integrity" of the contract, and that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' [grievance and arbitration] article of this Agreement." (A. 178; 186, 87) In *United States Steel Corp.* v. *United Mine Workers of America*, 534 F.2d 1063 (3rd Cir. 1976), the court held that this specific language:

> "* * * vitiates [UMWA's] claim that an express contractual basis for implying a reasonable efforts obligation is lacking in this case. From *Lucas Flour* we know that a no-strike undertaking will be implied from a grievance and arbitration clause. A covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the no-strike promise." 534 F.2d at 1073.

It is submitted that the Third Circuit's reasoning is unasailable. The language can have no other meaning.

The Fourth Circuit rejected this approach on the basis of the bargaining history. (PA pp A7, 8.) The history relied upon by the Fourth Circuit was that recited in *International Union, UMWA*, v. *NLRB*, 257 F.2d 211 (D.C. Cir. 1958) [overruled, sub silentio, in *Gateway Coal Co.* v. *United Mine Workers of America*, *supra* 414 U.S. at 384 (n.14)]. The problem with this reliance is that the Fourth Circuit decision considered only a *part* of the bargaining history and that the District of Columbia court's recitation of the bargaining history is *not* accurate. Moreover, even with that bargaining history, as inaccurately stated therein, the District of Columbia Court actually interpreted the "maintenance of integrity" language relied upon by Carbon as imposing a contractual obligation (however illusory) on the International to act affirmatively to prevent and end strikes over arbitrable issues. *International Union, supra*, 257 F.2d at 218.

The District of Columbia Court of Appeals' decision

relied upon by the Fourth Circuit for the bargaining history correctly recites that: an express "no strike" clause existed in the agreements between the parties prior to the 1947 Agreement (A. 137, 142); the 1947 Agreement, and all agreements subsequent to it, rescinded such express "no strike" clauses (A. 150 et seq.); and the 1950 Agreement contained a clause expressly requiring the parties to "exercise their best efforts through available disciplinary measures" to prevent work stoppages (A. 156, 57), which clause was eliminated in 1952 and has not reappeared. Upon the basis of the parties' elimination in 1952 of the "best efforts" clause, the Fourth Circuit concluded that the parties intended that the Union would thereafter not be obligated to use all reasonable means to prevent and stop strikes in violation of the contract. In so concluding, the Fourth Circuit ignored the crucial fact that there was added to the Agreement in 1950, and included in every Agreement since that date, the clause requiring the parties to "maintain the integrity of the contract." It is Carbon's position, in line with the decisions of the Third Circuit, (Supra at p 29) and the view adopted by the Trial Court, that the language committing the Union to "maintain the integrity of the contract" necessarily imposes an all reasonable means obligation upon the Union.

Moreover, the complete and accurate bargaining history supports that construction. The complete and accurate collective bargaining history is set forth in *International Union UMWA*, (Boone County Coal Corp.), 117 NLRB 1095 (1957), the NLRB decision which the District of Columbia Circuit refused to enforce in *International Union* v. *NLRB, supra*. The bargaining history as therein set forth shows that as a result of the passage of

§ 301 of the Taft-Hartley Act, the Union insisted upon and got changes in the 1947 Agreement. Those changes were: (1) the rescission of all "no strike," "penalty" and "illegal suspension of work clauses" in prior agreements; *and* (2) inclusion of an "able and willing" clause. (See A. 147; 150 and *International Union, supra*, 117 NLRB at 1114.) The purpose of these 1947 changes was to relieve the Unions from damage liability for strikes. *Id.* The International wanted the "able and willing" language to assure that it would have no obligation to see that its members worked when they were willing to do so.[1] The operators found the above-stated provisions

[1]The D. C. Circuit erroneously characterized the "able and willing" language. It said:

> "The 'able and willing' clause, as the Panello decision shows, was intended to permit the International Union and its President, John L. Lewis, to adjust the production of coal to the depressed market by closing mines at his discretion. It seems to have no connection with the problem of 'no strike' and 'no stoppage' clauses." 257 F.2d at 216.

The *Panello* decision, cited by the D. C. Circuit (*Panello* v. *International Un UMWA* (89 F.Supp 935 (D.C. 1950), was an action under Section 10(j) of the Act for an injunction, pending formal adjudication by the Board of unfair labor practices filed by Southern Coal Producers, et al. against the International Union, for, among other things, insisting in negotiations for the 1950 agreement upon inclusion of the "able and willing" language. Those unfair labor practice cases were assigned numbers 5-CB-43, 5-CB-44, 5-CB-45, 5-CB-46, and 5-CB-47 before the National Labor Relations Board.

Those cases (Nos. 5-CB-43 through 47) were decided by the Board upon the basis of an unpublished Trial Examiner's Intermediate Report, issued in December, 1950, authored by the same Trial Examiner who heard and determined the case reviewed by the D.C. Circuit in *International Union* v. *NLRB, supra*, i.e., Arthur Leff. The pertinent portions of this unpublished opinion are reproduced in an appendix to this brief. Trial Examiner Leff, in deciding the case reviewed by the D.C. Circuit, relied upon and apparently took administrative notice of his findings in the earlier cases. See 117 NLRB at 1114, notes 20 and 21. His conclusions in Case No. 5-CB-43 through 47, adopted in the latter case, as to the purpose and intent of the "willing and able" clause, are contrary to the above-quoted conclusion of the D. C. Circuit. Specifically he held:

(1) That the sole intent and purpose of the inclusion of the "able and willing" language in the 1947 Agreement was to relieve the UMW of liability from strikes, because, among other reasons, it was interpreted by them to establish that "the purpose of the collective bargaining agreement was merely to provide a structure of employer-employee relations fixing the terms and conditions of employment while

(Footnote continued on next page)

of the 1947 Agreement unacceptable in practice, because, among other reasons, they tended to give rise to abuse in the form of wildcat strikes over grievances. Therefore, they insisted in negotiations for the 1950 Agreement upon changes "reimposing financial responsibility upon the Union and its members for wildcat strikes." *International Union supra,* 117 NLRB at 1114, 5, n. 21. As a result of those negotiations, the 1950 Agreement did not contain the "able and willing" language; and it added the "integrity" provisions as follows:

> "The United Mine Workers of America and the Operators * * * affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout. . . ." (A. 156, 57)

Retained in "MISCELLANEOUS" §3 of the 1950 Agreement, was the promise, first made in the 1947 Agreement, to settle all disputes through the grievance and arbitration machinery.

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employees worked; but that no obligation was imposed on them to work, *or upon the Union to have them do so, unless they were able and willing.*" *International Union, United Mine Workers of America (Southern Coal Producers Association)*, Cases No. 5-CB-43 through 47, unpublished Intermediate Report, Appendix to Brief, (AB) p. A-3. (Emphasis added)

(2) That prior to negotiations for the 1950 Agreement, UMWA and John L. Lewis interpreted and applied the language beyond its intent to permit the UMWA to control production in order to equalize work among the members.

(3) That the operators in the negotiations for the 1950 Agreement sought and obtained deletion of the "willing and able" language because they objected to its use for *either purpose.* See *International Union, United Mine Workers of America (Southern Coal Producers Association*, Cases No. 5-CB-43 through 47; unpublished Intermediate Report) AB p. A-4, 5.

Upon compliance with the Intermediate Report, the NLRB on August 10, 1951, dismissed cases No. 5-CB-43 through 47. The injunction rendered in *Pannello* was, of course, vacated, since its conclusions were *not* supported by the ultimate NLRB findings. Why the D. C. Circuit relied upon the vacated interlocutory decision, rather than the final decision in the case, is a mystery.

The Union found, during the term of the 1950 Agreement, that the "best efforts through available disciplinary measures" requirement was objectionable. However, their objection was not to the obligation to do *something* about wildcat strikes, but to the operator's contention that the language obligated them to use discipline in *all* instances. See *International Union, supra,* 117 NLRB at 1115, n. 22. Thus, in negotiations for the 1952 Agreement, the Union sought and obtained the delegation of the "best efforts through available disciplinary measures" language. The "able and willing" clause continued to be deleted, and the promise to "maintain the integrity of the contract" remained. As found by the Trial Examiner, whose findings were adopted by the National Labor Relations Board in the *International Union* case:

> "As for the deletion of the 'best efforts' clause, I think no greater significance should be attached to this than the reason, * * * [at p. 1115, n. 22] given by counsel at the hearing that it was because the Union did not want to be told by others what disciplinary action, if any, it must take against its own members to force them back to work. I think it more significant that the parties retained in the 1952 Amendments their covenant to 'maintain the integrity of the contract.' " 117 NLRB at 1118.

The "integrity" clause of the 1952 amendments was continued, without alteration, in the 1968 and 1971 contracts sued upon in this case.

Thus, a review of the complete and accurate collective bargaining history shows (1) that the "able and willing" language was deleted and the "maintain the integrity of the contract" provision inserted in the contract in 1950, on the insistance of the operators in an effort to remedy

the wildcat strike situation by reimposing financial responsibility upon the unions; (2) that the operative part of the "integrity" language, and the deletion of the "able and willing" language, was continued without change in the contracts sued upon here; and (3) that the "integrity" provision can have no meaning unless it means that the Unions are obligated to make efforts to prevent and end strikes in violation of the Agreement.

Moreover. even the District of Columbia Court of Appeals majority in *International Union* v. *NLRB, supra,* recognized that the "integrity" language alone, without any significance attached to the deletion of the "able and willing" language, must have such a meaning. It said:

> "It is of course fair to ask what the court thinks subdivision 3 of the 'Miscellaneous' article of the contract meant. We think it was, in effect, a 'gentlemen's agreement' that the desirable way to settle disputes was by the use of the grievance machinery; *that the responsible officials of the union hierarchy would do their best to see that that procedure was followed; that they would put such pressure as seemed to them to be wise and likely to be effective upon the members and the inferior echelons in the hierarchy to induce or coerce them to refrain from striking.*" 257 at F.2d at 218. (Emphasis added)

The D C. Circuit's majority conclusion that the no-strike obligation was, in essence, an illusory "gentlemen's agreement," is, of course, long dead and buried under an overwhelming number of contrary decisions including *Gateway Coal, supra.* Its conclusion that the collective bargaining history shows that the integrity language meant that the District and International have an obligation to take action to enforce the implied no-strike clause remains. In short, such an interpretation does

not, as indicated by the Fourth Circuit's decision, "rewrite the terms of the contract[s] upon which the parties agreed (P.A. at All.);" but is the only interpretation which is in accordance with the bargaining history.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the judgments against the District and International relating to the thirty-one strikes over arbitrable issues, should be reversed.

Respectfully submitted,

DAVID D. JOHNSON
FORREST H. ROLES
JACKSON, KELLY, HOLT & O'FARRELL
1500 One Valley Square
Charleston, West Virginia

LARRY L. ROLLER
1300 One Valley Square
Charleston, West Virginia

Counsel for Carbon Fuel Company

APPENDIX

APPENDIX TO BRIEF OF CARBON FUEL COMPANY

Portions of Unpublished Intermediate Report of Trial Examiner Arthur Lett in Cases 5-CB-43 through 5-CB-47 Before the National Labor Relations Board.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 5-CB-43

In the Matter of

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, its PRESIDENT

and

SOUTHERN COAL PRODUCERS ASSOCIATION
on behalf of coal operators represented by it

Case No. 5-CB-44

In the Matter of

UNITED MINE WORKERS OF AMERICA, and
JOHN L. LEWIS, its PRESIDENT

and

INDIANA COAL PRODUCERS ASSOCIATION, et al

Case No. 5-CB-45

In the Matter of

UNITED MINE WORKERS OF AMERICA, and
JOHN L. LEWIS, its PRESIDENT

and

H. C. FRICK COKE COMPANY, et al

Case No. 5-CB-46

In the Matter of

UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, PRESIDENT thereof

and

CENTRAL PENNSYLVANIA COAL PRODUCERS ASSOCIATION

In the Matter of

UNITED MINE WORKERS OF AMERICA, and JOHN L. LEWIS, its PRESIDENT

and

ARMCO STEEL CORPORATION, et al

* * *

36 **(c) Alleged insistence that collective bargaining agreements contain provisions such as the "able and willing" and memorial period clauses which, it is claimed, were intended and designed to permit the Union unilaterally to abrogate or suspend the collective bargaining contracts at any time, and to determine when union members will work, so that the agreements would not be binding on the Union or fix the terms and conditions of employment.**

Analysis requires determination of what objectives the clauses in question were intended and designed to accomplish; whether these objectives involved legitimate subjects for collective bargaining; and, if so, whether the Union's approach and bargaining position with regard to them were such as to constitute a refusal to bargain in good faith.

First: What were the purposes of the clauses and what issues were raised concerning them in the bargaining negotiations?

The original purpose of the memorial period clause does not appear to have been broader than a literal reading of it suggests. The "able and willing" clause was requested by the Union and agreed to by the Operators in the 1947 negotiations for the purpose of safeguarding the Union from damage suits based upon employee work stoppages during the term of the contract. It was designed to supplement the rescission, simultaneously agreed upon, of all "no-strike", "penalty" and "illegal suspension of work" clauses in prior contracts, so as to remove the possibility of there being read into the contract any implied contractual responsibility for work stoppages during its term. This it did by making clear in substance that the purpose of the collective bargaining agreement was merely to provide a structure of employer-employee relations fixing the terms and conditions of employment while employees worked; but that no obligation was imposed on them to work, or upon the Union to have them do so, unless they were able and willing.[24]

[24]This did not deprive the agreement of mutuality of obligation; for there was implicit in the agreement a promise by both parties not to seek during its term any change in the terms and conditions fixed by the contract to govern employer-employee relations while miners were actually employed. Moreover, the contract was enforceable at least with respect to executed transactions, thus differing from an understanding to which no legal effect can be given. The contractual freedom retained by the miners not to work unless able and willing was no less than the contractual freedom retained by the Operators not to operate their mines and provide employment unless they were able and willing to do so.

Cf. *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332, 334, where the Supreme Court stated:

> Collective Bargaining between the employers and representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not,

(Footnote continued on next page)

37 Before the 1949 negotiations began, the Respondents placed the Operators on notice that, if written into the new agreement, the "able and willing" and memorial period clauses would also be interpreted in a manner not contemplated by the Operators when the clauses were originally negotiated, that is, as supplying a mechanism by which the Union during periods of over-production could allocate working time in the industry with the objectives of spreading work, equalizing employment opportunities, and generally promoting industrial stability. This was most clearly disclosed by Lewis in his speech at the Union's October 1948 convention. He there declared in substance that if the Union was still unable "to work out with the bituminous operators any kind of a nationally stabilized arrangement," the Union might find it necessary to exercise its "contractual right" to advise its members "how many days a week they need to work."

The Operators during the negotiations attacked the clauses in question along two fronts. First, they objected to the "able and willing" clause along with the omission of the "no-strike" and "penalty" and "illegal suspension of work" clauses, because, as they asserted, this had given rise to abuses in the form of numerous wildcat work stoppages over minor grievances. These abuses from wildcat strikes, they agreed, should be corrected

however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence by it alone. The negotiations between a union and management resulted in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules of service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. . ."

by reimposing financial responsibility upon the Union and its members for work stoppages, through restoration of the no-strike and penalty clauses and the elimination of the "willing and able" clause. Secondly, and more strenuously, they objected to the use by the Union of the "contractual options" under both the "able and willing" and memorial period clauses for the purpose of allocating working time. The Operators contended in substance that the control of mine facilities and the determination of when the mines would operate was a prerogative of management, and that it was the Union's responsibility to see to it that men were available for work while mines were running.

Thus, there were basically two issues raised at the bargaining conferences growing out of the clauses in question — (1) whether the new contract should continue to exculpate the Union from responsibility for work stoppages during the term of the contract, and (2) whether the new contract should contain "contractual options" which would permit the Union to call a cessation of work operations during certain days of the week or periods of the year with the objective of spreading working time, achieving equalization of employment opportunities for union members, and preventing unstable conditions in the industry. There was never any

38 intent indicated by the Respondents to utilize these clauses for the purposes of altering, modifying, or terminating during the contract term any of the fixed terms and conditions of the contract governing employment relations while the mines operated and the miners worked. As to these, indeed, the Union's representatives assured the Operators in the course of the negotiations that they, no less than the Operators, desired

a firm contract. It was never claimed by the Operators that these clauses might be used to justify strikes designed to modify fixed terms of the contract while the contract remained alive, and this was not involved in the controversy at all. To the extent, then, that the complaint alleges the clauses were intended and designed to permit the Union unilaterally to determine when union members will work, the complaint is found supported by the record. To the extent, however, that the complaint alleges the clauses were intended and designed to permit the Union to abrogate or suspend the contracts during the contract term — in the sense of changing, varying, or terminating fixed terms and conditions governing the employer-employee relations while the mines were operating and the men working — it is found to lack record support.

Second: Were the controverted objectives of the clauses such as to constitute legitimate subjects for collective bargaining?

We consider first the exculpatory objectives of the "able and willing" clause, designed to supplement the omission of "no-strike", "penalty" and "illegal suspension of work" clauses contained in contracts prior to 1947. Although the scheme of statutory collective bargaining contemplated by the Act envisages the reduction of strikes and industrial unrest, Congress nevertheless specifically reserved and protected the right of employees to strike and engage in concerted work stoppages, except in certain restricted circumstances not germane to this discussion. The right concertedly to desist from work is not, to be sure, an absolute one; it is one that may be waived or limited by contract. But whether it is to be waived or limited, and the obligation, if any, that a

union is to assume for itself and the employees to refrain from work stoppages during the term of a contract, and what sanctions, if any, should be imposed for breach of any obligation expressly or impliedly agreed upon, have long been considered appropriate subjects for collective bargaining. These are among the subjects that must be hammered out in the collective bargaining process by the negotiating parties themselves, according to their needs, their duties, and their bargaining strength, and not according to the Board's judgment of what may be best in the circumstances.

The amendments to the Act have wrought no change in this concept. Section 301, making unions as well as employers suable for breach of contract, presupposes a prior consentual arrangement, express or implied, for breach of which suit will lie. Although that section — as its legislative history shows — was designed in the interest of making collective bargaining contracts "equally binding and enforceable on both parties" by preventing unions from breaking agreements with "relative impunity,"[15] it may not fairly be read as creating a substantive regulation of the kind of bargain parties must be willing to embrace in order to establish good faith. Section 301 neither requires contracts to be executed for a fixed term nor prohibits parties from preserving in the contract the right to strike during its term. There is nothing in the language of that section to imply that Congress intended to do more than remove obstacles to the enforceability of contract terms by which the parties themselves had agreed to be bound. Other portions of the legislative history of Section 301 confirm this view. Thus, it specifically appears from the Senate Report that Con-

[15] Senate Report No. 105, 80th Cong., 1st Sess., pp. 15-17.

gress was aware that the omission of a no-strike
39 clause in a contract would provide a means of avoiding application of the section. Yet it allowed Section 302 to remain unchanged, stating (in the Senate Report) that its inclusion in the Act was still an "improvement" because the incorporation of a no-strike clause "is certainly a point to be bargained over."[26] What was said with regard to the bargainability of a no-strike clause would seem to have equal application to any contractual provision which has the effect of exculpating a union and employees from financial responsibility resulting from work stoppages during the contract term.[27]

Nor does Section 8 (d) — prohibiting strike action to "terminate or modify" a contract for 60 days after notice — require a different conclusion. Neither the language of that Section nor its legislative history suggests that it was designed to limit the right of parties freely to negotiate and fix by mutual agreement the private liabilities each is to incur toward the other under the collective bargaining contract. Section 8 (d), enacted in the public interest, has, it is true, the practical effect of superimposing on every contract in applicable situations a 60 day no-strike legal requirement, enforceable, in the event of a violation, through unfair labor practice proceedings and the deprivation of employee rights. But simply because that legal requirement and the right to seek its enforcement may not be bargained away, it does not follow that it must be written into every agreement as a minimum *contractual obligation* for breach of which

[26]Senate Report No. 105, 80th Cong., 1st Sess., p. 18.

[27]See, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, at pp. 283, 303-312 for an illuminating discussion of the question whether a union's insistence upon a grant of financial immunity constitutes an unfair labor practice under Section 8 (b) (3) of the Act. Professor Cox concludes that it does not.

civil damages may be assessed. In any event, Section 8 (d) is inapposite. That Section, it must be emphasized, is restricted by its terms to strikes to *modify* or *terminate* the terms and conditions of an existing contract. As has been noted, neither the "able and willing" nor the memorial period clause had as their objectives the modification or termination of established terms and conditions of employment, which, although made applicable under the "able and willing" clause only while employees worked, were to govern relations for the length of the contract's duration. The Operators in the bargaining conferences never contended otherwise, and as to that no issue was ever raised. What the Operators were complaining of was that the "able and willing" clause had unduly encouraged wildcat work stoppages over alleged grievances, and that both it and the memorial period clause were being interpreted so as to permit work stoppages which would have the effect of achieving production controls. But work stoppages of the kind complained of, *if permitted by a contract*, can scarcely be said to be in violation of it, or for the purpose of modifying or terminating it.

In finding as I do that the Union's exculpatory objective under the "able and willing" clause constituted a legitimate subject for collective bargaining, I do not mean to imply that a union's insistence upon the exclusion of no-strike and the inclusion of exculpatory provisions may under no circumstances be considered as evidence of bad faith bargaining. Such insistence when found coupled with other evidence — for example, evidence of a fixed purpose to refrain from entering into *any* bilateral contract or of a purpose to circumvent restrictions of the Act — may be considered in determining

that there was a bad faith approach to the collective bargaining process.[20] But, standing alone, and absent such other evidence, I do not believe that even an insistent position on a subject Congress had indicated "is certainly a point to be bargained over" is enough to prove illegality.

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[20]Cf. *Chicago Typographical Union*, 80 NLRB No. 116.